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07-383

FILED
OCT 16 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

DAVID H. AND CATHERINE M. VOORHEES,
HUSBAND AND WIFE,

Petitioners,

v.

BOARD OF ZONING APPEALS OF FAIRFAX COUNTY,
EILEEN M. MCLANE, FAIRFAX COUNTY
ZONING ADMINISTRATOR,
PJB, LLC, PFK, LLC AND HALL HOLLIN, LLC,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

BRIEF IN OPPOSITION

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This Opposition to the Petition for Writ of Certiorari is being filed by PJB, LLC, PFK, LLC and Hall Hollin, LLC, which are the owners of the lots involved in this case.

STATEMENT OF THE CASE

This case involves the redevelopment of existing lots in a subdivision in Fairfax County, Virginia. The subdivided lots were established in 1943 and re-established in 1946. Single houses were constructed that straddled the lot line between two lots, thus one house occupied two lots. This case resulted from the demolition of the existing houses for the purpose of constructing one house on each lot.

The Fairfax County Zoning Administrator ruled the redevelopment was permitted by the Fairfax County Zoning Ordinance. The ruling was appealed to the Fairfax County Board of Zoning Appeals (BZA). The BZA upheld the decision of the Zoning Administrator. The BZA's decision was appealed to the Circuit Court of Fairfax County which upheld the BZA. The Virginia Supreme Court denied the appeal of the decision of the Circuit Court, as well as the petition for rehearing.

SUMMARY OF THE ARGUMENT

This case involves a dispute over the interpretation of a local zoning ordinance. It does not involve a rezoning or a re-subdivision of property as the Petitioners would have the Court believe. It involves redevelopment of existing subdivided lots that have been determined by the Zoning Administrator, the BZA, the Circuit Court and the Virginia Supreme Court to be consistent with applicable law. There is no suggestion in Virginia law that a property owner has a property right to the continuation of the existing use of another's property. Thus, the Federal Constitution is not implicated by the change of use of another's property or the process leading to the change of use

of another's property. The Petitioners have been granted the legislatively created right to challenge the change in use of another's property, and they have fully availed themselves of that right.

The Petitioners now seek to create Federal Constitutional issues where none exist, and where none were raised in the Circuit Court below. In the process, the Petitioners ignore controlling principles of law, as well as the proceedings below. As to one issue, the Petitioners misrepresent what transpired at the proceedings in the Circuit Court. The Petition should be denied.

ARGUMENT

I. The Zoning Classification Provisions Related To Density Were Not Violated

There was no rezoning of the lots involved in this appeal, nor was there an unauthorized increase in density. The density permitted in every zoning classification of Fairfax County is controlled by Section 2-405 of the Fairfax County Zoning Ordinance, which provides in pertinent part:

> If a lot was recorded prior to March 1, 1941, or if a lot was recorded prior to the effective date of this Ordinance, and said lot met the requirements of the Zoning Ordinance in effect at the time of recordation, then such lot, either as a single lot or in combination with other such lots pursuant to a Building Permit, may be used for any use permitted in the zoning district in which located under this Ordinance even though the lot(s) does not meet the minimum district size, lot area and/or lot width requirements of the district, provided all other regulations of this Ordinance can be satisfied.

It was factually determined by the Zoning Administrator, the BZA and the Circuit Court that Section 2-405 of the Fairfax County Zoning Ordinance applied to the lots at issue. In addition, there is no suggestion in Virginia law that one has a property right to insist that another property owner cannot change the use of his property. In fact, a property owner does not have a property right to the existing zoning on his own property. *Snow v. Amherst County Board of Zoning Appeals*, 248 Va. 404, 448 S.E. 2d 606 (1994).

II. Burden Of Proof

Evidence, sufficient to overcome any imagined burden, was presented by the Zoning Administrator to the BZA that the subdivision plats recorded in the 1940's were properly approved. (January 24, 2006 Report to the BZA). However, the burden issue is moot, because state legislation (Virginia Code Section 15.2-2266), and the Subdivision Provisions in the Fairfax County Code (Section 101-1-12) validate subdivisions recorded prior to January 1, 1953 and September 1, 1947, respectively. Specifically, Virginia Code Section 15.2-2266 states:

> Validation of certain plats recorded before January 1, 1953.—Any subdivision plat recorded prior to January 1, 1953, if otherwise valid, is hereby validated and declared effective even though the technical requirements for recordation existing at the time such plat was recorded were not complied with.

Specifically, the Subdivision Provisions in the Fairfax County Code Section 101-1-12 states

> Validation of certain divisions of land recorded by metes and bounds or an unapproved plat before September 1, 1947. (a) All divisions of land undertaken by the recordation among the land records of Fairfax County prior to September 1, 1947, of a

metes and bounds description or a plat not approved by the appropriate County board, agency or official that complied with all applicable provisions of the Zoning Ordinance in effect at the time the description or plat was recorded or at some time thereafter, or meet the provisions of Sect. 2-405 of the Zoning Ordinance, except as noted in paragraph (b), are hereby validated and shall for all purposes be deemed to be in compliance with all provisions of the Subdivision Ordinance in effect at the time they were recorded as if they had fully complied with all provisions of said Subdivision Ordinance.

(b) Any lot or parcel that is the result of a division of land undertaken by the recordation among the land records of Fairfax County prior to September 1, 1947, of a metes and bounds description or a plat not approved by the appropriate County board, agency or official which did not comply with the applicable minimum district size, lot area and/or lot width provisions of the Zoning Ordinance in effect at the time the description or plat was recorded or at some time thereafter, or does not meet the provisions of Sect. 2-405 of the Zoning Ordinance is hereby designated as an outlot under the Subdivision Ordinance and shall not constitute a buildable lot.

The deeds of subdivision for Hollin Hall Village were recorded in 1943, and a deed of re-dedication and re-subdivision and plat were recorded in 1946, and therefore, are valid.

III. All Petitioners Were Represented By Counsel Of Their Choosing

The trial transcript contradicts the Petitioners' statement appearing on Page 25 of their Petition that it was made clear in the Circuit Court that David Voorhees was not the official counsel for the Plaintiffs in the Circuit Court. The transcript also contradicts the Petitioners' statement on Page 27 of their Petition that the Circuit Court "appointed" David Voorhees to be counsel for the Plaintiffs. The following exchange appears on pages 30-37 of the transcript:

> MR. EMRICH: "Well, if it please the court, and I don't want to beat a dead horse, but David Voorhees entered his appearance in this case and has not withdrawn on behalf of –"
>
> THE COURT: "Right now he's the lawyer for the group then; right?"
>
> MR. EMRICH: "Well, yes, he has entered his appearance."
>
> THE COURT: "I have a large file. I have no idea where he entered his appearance."
>
> MR. EMRICH: "Well, he filed -- and correct me if I'm wrong -- he filed a motion. It was either to oppose our intervention—."
>
> MR. VOORHEES: "Yes, I filed a motion to oppose the intervention. And then we brought in other counsel to argue that motion. But I did not withdraw my appearance. But I'm not sure that I entered an appearance on behalf of the whole group, or whether I just brought it on behalf of myself. I can't remember exactly how – what the – "
>
> MS. VOORHEES: "You substituted for me."

MR. VOORHEES: "Okay. Oh, I did?"

MS. VOORHEES: "Yes."

MR. VOORHEES: "Then I represented the whole group. And I have not withdrawn, Your Honor."

THE COURT: "So I guess you're the lawyer for the whole group; is that what you think? Is that what you think, Mr. Emrich?"

MR. EMRICH: "Well, Your Honor, I just think, as Mr. Wynn stated, I think we have an obligation to raise the issue with the court, if we think there's a possibility of unauthorized practice of law. So that's why we originally raised it. And as to whether or not Mr. Voorhees is going to withdraw now, I mean, I don't know the answer to that. He's still – As I understand the rule, he's still attorney of record in the case."

THE COURT: "Mr. Voorhees, do you work in your own firm, or what is your –"

MR. VOORHEES: "In my capacity as an individual lawyer, not as part of my firm. But, you know, we can continue."

THE COURT: "I'm sorry, sir, you said what?"

MR. VOORHEES: "I said, I will – If I am of counsel in the case, then we can just continue on that basis, I guess."

THE COURT: "So you're going to represent all the plaintiffs as a lawyer?"

MR. VOORHEES: "Yes."

THE COURT: "Okay."

MR. VOORHEES: "If I have everyone's consent."

THE COURT: "Well, then I guess the Concerned Citizens of Hollin Hall Village are back in the case, if Mr. Voorhees is representing everyone."

"(Ms. Voorhees and Mr. Voorhees conferred briefly.)"

MR. VOORHEES: "Yes, ma'am."

THE COURT: "Okay. Sir, then I guess you're going to put on the case."

MR. VOORHEES: "Well, can I have my assistant counsel put on the case, since she's an attorney?"

THE COURT: "She's not affiliated with you, sir is she?"

MS. VOORHEES: "I'm married to him."

THE COURT: "I know you're married to him. But I don't think you're affiliated with him."

MR. VOORHEES: "But she's a petitioner. Can't she present evidence?"

THE COURT: "No."

MR. WYNN: "I would object, Your Honor, to her participating in the case."

(Ms. Voorhees had previously been Counsel in this case for all parties, but she had withdrawn before trial.)

THE COURT: "It's the same old problem."

MR. VOORHEES: "But – "

THE COURT: "Come on, if you're the lawyer— "

MR. VOORHEES: "But we're all individual petitioners, as well."

THE COURT: "Well, I'm not going to --I suppose –

Mr. Wynn?"

MR. WYNN: "Well, I was just going to say that he is now saying that he's going to represent everybody. But now he also wants everybody to represent themselves. I think that they have to be consistent. Either you're going to be the attorney for these people and speak for all of them, or they all have to speak for themselves."

THE COURT: "Let me have the Voorhees think about that for just a second. But let me ask you another question. So the BZA says that these people are aggrieved. And they are going to testify individually, I take it, about the ways in which their particular houses are affected by this particular development?"

MR. WYNN: "Your Honor, I don't know what their case is, other than what they have argued in their brief."

THE COURT: "But in order for them to be individually involved and individual pro se petitioners, that's what they would have to do. The brief doesn't talk about – I mean, the brief doesn't talk about, as I recall, people's individual grievances with regard to their neighborhood. The brief talks about these global issues, about zoning and subdivision and approvals and everything else."

MR. WYNN: "That's correct, Your Honor."

THE COURT: "This brief is a brief that would be filed by a lawyer – "

MR. WYNNE: "Yes, Your Honor."

THE COURT: "—representing a group, not by individual petitioners."

MR. WYNN: "And if Mr. Voorhees is going to represent these people, as counsel, then he has to speak for the group. He has to present their case."

THE COURT: "Okay. Mr. Voorhees, it appears to me at this point that – And you might want to look through your file and satisfy yourself that you made an appearance. I don't mean to railroad you into this. If you made an appearance, perhaps you want to find it so that Mr. Emrich and I are on the same page, and you. But right now it looks like you're representing the group, which means that you have to function as a lawyer in this court."

MR. VOORHEES: "Right."

THE COURT: "Which may not be as hard as you think it is."

MR. VOORHEES: "No. The only thing is that she had prepared -- "

THE COURT: "Your wife is going to lose – "

MR. VOORHEES: "She had prepared to argue the case, more than I had. But – "

THE COURT: "Well, that's the way it goes."

MR. VOORHEES: "All right."

THE COURT: "Now, is your wife going to lose her job, because you're standing up and representing the group?"

MR. VOORHEES: "I don't think so."

MS. VOORHEES: "I've consulted with the Virginia State Bar. And they tell me that they may retaliate, but they don't have a case, that the Virginia State Bar would not agree with their position, if he argued the case."

THE COURT: "Well, that's kind of a sad way to go, in terms of – Okay. Then we are all set then. I think we're all set. We've torturously gone through the whole thing. Any other questions that anyone has at this point before I take opening statements? No?"

MR. VOORHEES: "No questions."

THE COURT: "Okay. Mr. Emrich, I'm glad you brought that up, about his making an appearance, because I think that saved the lawsuit in a way that will enable us to go forward today."

MR. EMRICH: "Yes, Your Honor. I think that was what I had to do."

THE COURT: "Mr. Voorhees."

MR. VOORHEES: "Your Honor, are you ready?"

THE COURT: "Uh-huh."

Counsel is not aware of a constitutional principle that a party may both represent herself and be represented by an attorney.

IV. The Scope Of The Review By The Board Of Zoning Appeals Was Not Limited By County Staff

The notice to which the Petitioners refer to on Page 28 of their Petition is notice to the public that the BZA will consider the appeal of the Petitioners. The notice goes on to identify the addresses of the properties involved, and to state where anyone who is interested can review a copy of the appeal application. (BZA R.082). There is nothing in the record that suggests that one BZA member, whose statement the Petitioners quote, let alone a majority of the BZA members, were of the opinion that staff had limited them in the performance of their duties. This argument of the Petitioners is simply a disagreement with an interpretation of a local zoning ordinance.

CONCLUSION

WHEREFORE, the Respondents respectfully request that the Petition be denied.

Respectfully submitted,

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